

**Hawk of Connecticut, Inc. and Hawk Air & Sea
and International Brotherhood of Teamsters,
Local Union No. 677.**

**Hawk Air & Sea and International Brotherhood of
Teamsters, Local Union No. 677.** Cases 34-CA-
6630 and 34-CA-6746

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On August 25, 1995, Administrative Law Judge George F. McNerny issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that Respondent Hawk of Connecticut and Respondent Hawk Air & Sea were alter egos. He found, however, that they were not a single employer. There are no exceptions to the latter finding. Although the Respondent argues that the two companies are not alter egos, the Respondent does not contend that single employer status is a necessary precondition for alter ego status. Thus, we need not address the issue of whether "alter ego" is a sub-set of "single employer." See *Stardyne Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994), denying enf. in relevant part and remanding *Johnstown Corp.*, 313 NLRB 170 (1993).

In finding that Respondent Hawk Air & Sea is the alter ego of Respondent Hawk of Connecticut, the judge relied on the factors cited in *Crawford Door Sales*, 226 NLRB 1144 (1975), and on evidence showing that Hawk Air & Sea was created to avoid Hawk of Connecticut's existing labor-law obligations. In agreeing with the judge, we note that a showing of unlawful motivation is not essential to the finding of alter ego status, but is a factor to be considered in each case. *Yerger Trucking*, 307 NLRB 567, 575 (1992), citing *Hiysota Fuel Co.*, 280 NLRB 763 fn. 2 (1986); *Goodman Piping Products v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984).

Member Cohen agrees with the judge and his colleagues that Respondent Hawk of Connecticut created Respondent Hawk Air & Sea for an antiunion purpose. He therefore does not reach the issue of whether such a purpose is a necessary element for an alter-ego finding.

² We shall modify the judge's remedy and recommended Order to provide standard remedial language for the violation found.

AMENDED REMEDY

Having found that the Respondents failed to continue in effect the terms and conditions of the 1991-1994 National Master Freight Agreement, we shall order the Respondents to make whole unit employees by paying any and all delinquent contributions to contractually required fringe benefit funds and any liquidated damages thereon, including any additional amounts applicable to such delinquent payments as determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondents shall reimburse employees for any expenses ensuing from its failure to make such required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Hawk of Connecticut, Inc. and Hawk Air & Sea, Danbury, Connecticut, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Honor and abide by the terms and conditions of employment provided in the 1991-1994 National Master Freight Agreement, and make whole their employees who are represented by the Union for any loss of pay and other benefits that they suffered as a result of the Respondents' refusal to continue in effect the terms of the 1991-1994 National Master Freight Agreement, with interest, as set forth in the amended remedy section of this decision."

2. Substitute the following for paragraph 2(c).

"(c) Pay all contractually required fringe benefit fund contributions and liquidated damages thereon that have not been paid, and make unit employees whole for any expenses resulting from the failure to make such contributions, with interest, as set forth in the amended remedy section of this decision."

3. Substitute the attached notice for that of the administrative law judge.

³ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT bargain individually with our employees while we are obligated to bargain with a union.

WE WILL NOT refuse to bargain in good faith by withdrawing recognition or otherwise refusing to recognize or bargain with International Brotherhood of Teamsters, Local 677, as the exclusive representative of our employees in the following appropriate unit:

All drivers, a mechanic and a dispatcher employed by Hawk of Connecticut, Inc. and Hawk Air & Sea, but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT fail to pay contractually mandated wage rates and to make payment to Pension and Health and Welfare funds on account of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and abide by the terms and conditions of employment provided in the 1991-1994 National Master Freight Agreement, and WE WILL make whole our employees for any loss of wages and other benefits they may have suffered by reason of our refusal to continue in effect the terms of the collective-bargaining agreement, with interest.

WE WILL make all contractually required fringe benefit contributions that have not been made, and WE WILL make whole the unit employees for any expenses ensuing from our failure to make such contributions, with interest.

WE WILL, on request, bargain collectively in good faith with the Union.

HAWK OF CONNECTICUT, INC. AND
HAWK AIR & SEA

John S. F. Gross, Esq., for the General Counsel.
Kenneth E. Taylor, Esq. (Guendelsberger & Taylor), of New Milford, Connecticut, for Respondent Hawk Air & Sea.
Susan M. Wright, Esq. (Kainen, Starr, Garfield, Wright & Escalera), of Hartford, Connecticut, for the Trustee in Bankruptcy for Hawk of Connecticut.
Mr. Nicholas T. Cappiello Jr., of Danbury, Connecticut, for Respondent Hawk of Connecticut.
Thomas M. Brockett, Esq. (Robert M. Cheverie & Associates), of East Hartford, Connecticut, for the Union.

DECISION

GEORGE F. MCINERNEY, Administrative Law Judge. Based on a charge in Case 34-CA-6630, filed by International Brotherhood of Teamsters, Local Union No. 677 (the Union), filed on June 30, 1994,¹ and amended on August 30, and a charge in Case 34-CA-6746, filed by the Union on September 29, the Regional Director for Region 34 of the National Labor Relations Board issued, on October 20, an order consolidating Cases 34-CA-6630 and 34-CA-6746, and a complaint alleging that Hawk of Connecticut (Hawk) and Hawk Air & Sea (Air & Sea) are alter egos, and a single employer, under the provisions of the National Labor Relations Act. The complaint further alleges that the single employer has failed to continue in effect the terms and conditions of a collective-bargaining agreement between Hawk and the Union.²

Both Hawk and Air & Sea were represented by counsel and filed timely answers to the complaint in which they denied the commission of any unfair labor practices.

After filing an answer, the attorney who represented Hawk apparently withdrew from the case. At the hearing Hawk was represented by its owner, Nicholas T. Cappiello Jr. Air & Sea managed to hire a new attorney after its prior counsel also withdrew.

After a rescheduling, a hearing was held before me on May 8 and 9, 1995, at which all parties were represented³ and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to present and argue motions, to make offers of proof, and to argue orally.

After the hearing the General Counsel submitted a brief, which has been carefully considered.⁴

¹ All dates are in 1994 unless otherwise specified.

² The agreement was effective from April 1, 1991, to March 31, 1994.

³ Including Barbara Katz, Trustee in Bankruptcy of Hawk.

⁴ Counsel for Respondent Air & Sea submitted a brief that was mailed on June 21, 1995, and received at my offices on June 22, 1995.

The General Counsel filed a motion on June 28, 1995 to strike this brief as untimely filed. The Respondent filed an objection to this motion alleging that no party has suffered any bias or prejudice as a result of the brief having been mailed on June 21; that the relief sought (by the General Counsel) is not specifically provided for and is improper, and that the Respondent believed that filing his

Based on the entire record, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. *Hawk of Connecticut, Inc.*

The complaint alleges that Hawk of Connecticut, Inc. is a corporation with an office and place of business in Danbury and, at all material times, has been engaged in the intrastate and interstate transportation of freight. The answer, filed by the attorney who was then representing Hawk, denied the allegations in this paragraph but admitted that Hawk was engaged in the intrastate and interstate transportation of freight until June 31, 1994.⁵

The answer also admitted that Hawk derived gross revenues in excess of \$50,000 for the transportation of freight directly to points located outside the State of Connecticut, but then denied that Hawk was an employer engaged in commerce.

In view of the admissions in the answer, I ordered that this latter denial be stricken and I find that Hawk was at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.⁶

B. *Hawk Air & Sea*

The complaint alleges that Air & Sea has its office and place of business at the same "Danbury facility" as Hawk. The answer, as filed by Air & Sea's original lawyer, denied this, but did not deny that Air & Sea was a partnership. At the hearing, Air & Sea's new lawyer stated that Air & Sea has its office and place of business at 14 Harwood Drive in Danbury, and another location at 101 Commerce Road in Brookfield, Connecticut, and that Dorothy Axt and Mary

brief0within 35 days from the receipt of the transcript would fulfill the time requirement.

Responding to these issues, I find that the Board's Rules and Regulations provide in Sec. 102.42 that the administrative law judge assigned to a hearing may fix a reasonable time for the filing of briefs, not to exceed 35 days from the close of the hearing. At the close of the hearing on May 9, 1995, I stated on the record (Tr. 350) that I would set June 16 for the filing of briefs.

Counsel was well aware of the time for filing, and could not reasonably have assumed that he had additional time, after the receipt of transcripts, without making a request to the chief administrative law judge for an extension of time as provided in the Board's Rules and as stated by me on the record.

It does not matter that no one may have been prejudiced, or that there is no specific rule for this circumstance. It is enough that a time was set, in accordance with the Board's Rules, and with full understanding, expressed on the record by counsel, of the date briefs were due. There is no excuse here for a late filing, and no mitigating circumstances have been advanced. I, therefore, have no choice but to grant the General Counsel's motion to strike, I have stricken the brief and I have not read it or used it as a reference in this decision.

⁵Nicholas T Cappiello Jr., the owner and representative of Hawk, stated at the hearing that the actual date Hawk ceased transporting freight was June 27, 1994.

⁶See also Rule 11, Federal Rules of Civil Procedure, and National Labor Relations Board, Rules and Regulations, Sec. 102.21.

Ann Cappiello were partners doing business as Hawk Air & Sea.⁷

The complaint further states that Air & Sea will annually derive gross revenues in excess of \$50,000 for the transport of freight from the State of Connecticut directly to points outside that State. The answer admits this, but then denies that Air & Sea is engaged in commerce. At the hearing I ordered that this contradictory answer be stricken. At the same time counsel admitted, and I find, that Air & Sea is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The answers filed by both Hawk and Air & Sea allege that they have insufficient knowledge or information on which to form a belief whether or not Teamsters Union Local 677 is a labor organization.

Under Rule 11, FRCP and the Board's Rule 102.21, I ordered these answers stricken and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Hawk of Connecticut was located for some years in Stamford, Connecticut, but moved in 1986 to Miry Brook Road in Danbury. The Company had had a collective-bargaining relationship with the Teamsters Union while located in Stamford, and when it moved to Danbury it came under the jurisdiction of the Union involved here, Teamsters Local 677. Clifford Socquet, a business agent for Local 677, testified that he had administered contracts between Hawk and the Union since 1986.

The basic agreement covering Hawk's employees⁸ was the National master freight agreement, supplemented by a "lesser agreement" negotiated by Socquet for the Union, and Hawk's owner, Nicholas T. Cappiello Jr., and its president, Jack Thorne. The so-called "lesser agreement" was negotiated annually between the Union and the Company in order to fit the needs of the Company more closely than by the overall master freight agreement.

The collective-bargaining agreements covered 17 to 22 employees.⁹ Of these, some were drivers who handled freight in the form of bulk containers unloaded from, or loaded onto, ships docked in ports in and about New York City, Newark

⁷Dorothy Axt identified herself as the girlfriend of Nicholas Cappiello. Mary Ann Cappiello did not testify, but she was identified as Nicholas Cappiello's sister. It was stated on the record without objection that there is no partnership agreement between Dorothy Axt and Mary Ann Cappiello, and that no agreement or registration of a partnership is required in the State of Connecticut.

⁸The parties agreed at the hearing that the appropriate unit here is "All drivers, a mechanic and a dispatcher employed by Respondent Hawk, but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act."

⁹A list prepared by Clifford Socquet and introduced into evidence by the General Counsel shows 19 employees eligible for vacation payments as of June 1994.

and Elizabeth, New Jersey. Others picked up freight brought in by air to the three New York metropolitan area airports, Kennedy, LaGuardia, and Newark. Still others delivered or picked up freight to and from New York and Connecticut destinations. Some drivers would perform all these assignments, and others would have assignments exclusively to one of the three different job assignments.

The only supervisors at Hawk were Nicholas T. Cappiello Jr., the owner, and President Jack Thorne. Cappiello and Thorne also served as dispatchers and day-to-day supervisors of operations. Paula Schmitt was employed as a rate clerk at night and also acted as night dispatcher, although there is no evidence that she exercised any supervisory functions. She merely advised or assisted drivers who called in after Cappiello and Thorne had gone for the day. Paula Schmitt's husband, Mike Schmitt, was also employed at night, unloading trucks as they came in, and reloading freight for next-day deliveries. Mike Schmitt also performed minor maintenance work and fueled the vehicles for the next day.¹⁰

During the months of April to June 1994, there was another employee, a part-time bookkeeper and secretary named Dorothy Axt. Axt had another part-time job, with a law firm, during this same late spring period, and continuing into October or November 1994. Axt testified that in addition to her work with Hawk, she was also Nicholas Cappiello's girlfriend, and that they had lived together, on and off, since late 1993.

Nicholas Cappiello testified¹¹ that he brought Hawk a couple of years before June 1994. He stated that he had relied on the word of the prior owner on questions of debt, taxes, and receivables. Unfortunately, the debt and tax figures had been grossly understated, and Cappiello began to have money problems immediately on taking over the business.¹² He fell far behind in his payments under his contract with the Union. He owed the pension fund, at least 1 year of payments, and health and welfare, either 3 or 5 months. Other testimony here indicates that if an employer is over 3 months in arrears, health and welfare payments will be cut off for employees.

B. The Shutdown of Hawk's Operations

With all this in the background, Clifford Socquet met with Nicholas Cappiello at Hawk's Miry Brook Road facility on March 11, 1994. Socquet said that the new contract was coming up and Cappiello replied that things were looking good, and that maybe he could do something about (additional) holidays. He did say, however, that he was having trouble with nonunion competitors down on the waterfront in the New York area.¹³ Socquet told Cappiello that the Health

and Welfare was a priority and had to be paid up. Cappiello said, "OK."

The matter then rested until May 25, when Cappiello asked for a meeting with Socquet. Cappiello had some proposals that he wished to present to the Union. Socquet went to the Hawk office where Cappiello said that he was willing to raise the base rate for drivers from \$15.73 per hour to \$16 per hour. But under this proposal the drivers would then give back \$3 of the \$16, which money, in turn, Hawk would use to bring the health and welfare payments "up to par" (as Cappiello put it). Socquet did not know at that time how much Hawk was behind in its contributions to the funds, but he told Cappiello that he would bring these proposals back to the membership.

On June 5, a Sunday, Socquet held a meeting for all Hawk's unionized employees. According to the testimony of Brian Irwin, at that time a driver for Hawk, the meeting was loud and rancorous, but both Irwin and Socquet were in agreement that the majority of the members present agreed that they would not negotiate with Hawk until the Company paid up its delinquencies to the health and welfare fund.¹⁴

On the next day Socquet contacted Cappiello. The latter said Socquet came to Hawk's offices in person, Socquet said he called Cappiello on the telephone.

In any event, Socquet relayed to Cappiello the Union membership's action of the previous day. They would not negotiate with Hawk while the health and welfare funds were dangerously in arrears. Cappiello then asked how much money was needed. Socquet checked with the fund office and told Cappiello the money due was 3 months at \$8000 per month, or \$24,000. Cappiello offered \$10,000, but Socquet said that was not enough. Cappiello then said, "I'm going to have to close the doors." Socquet asked about the \$10,000 and Cappiello responded, "[G]et it from the bankruptcy. On June 13, Socquet went with some Hawk employees to set up a picket line at Hawk's property. He saw Nicholas Cappiello in his car, and Cappiello said to him, "I'm out of business." The picket line was not set up.

Cappiello's testimony differed in some details from Socquet's, although the results were substantially the same.

Cappiello said that Socquet came to the Hawk property on June 10, not June 6, and that he told Cappiello that he had to get \$40,000 or he would close down the Hawk operation. Cappiello offered him \$10,000, but Socquet replied, "[G]ive me the \$10,000, we're still closing you down." Cappiello then said, "OK, then we're out of business. Get in line with the rest of the creditors."

Brian Irwin's testimony corroborated Cappiello's memory of the amount demanded by Socquet at this June meeting. I found Irwin to be a generally credible witness, although I feel that he held back a lot of information he had on the formation of Air & Sea. But whether the amount Socquet demanded was \$24,000, as Socquet recalled, or \$40,000 as described by Cappiello, and in Irwin's testimony about the June 5 union meeting, Cappiello still only offered \$10,000, which was not enough in either case. This is not disputed, nor is the fact that Hawk shut down on Friday, June 10. Brian

¹⁰ Although Cappiello advised us that the bargaining unit at Hawk included a mechanic and a dispatcher, there is no evidence on the record that either of those positions was occupied at any material time herein.

¹¹ Cappiello acted as the representative of Hawk at the hearing, and he testified in narrative form as he gave his version of the facts in this case.

¹² He testified that when he took over, there was about \$180,000 owing to the Internal Revenue Service on account of income, social security, and medicare taxes.

¹³ I raised a question about this with Socquet when he testified about it. He agreed with me that it seemed unusual to have unorga-

nized workers there, but repeated that this is what Cappiello told him.

¹⁴ There was no clear statement by Socquet or Irwin on the precise extent of the pension fund delinquencies, but this is not important for a decision on the facts in this case.

Irwin testified that the employees were told by shop steward Richard West when they returned to Hawk's terminal at the end of that day that Hawk would not pay the health and welfare arrears, and that there were no assignments for the next week. We do not have in this record the actual date of the bankruptcy filing, but from the appearance of counsel for the Trustee, and intimations in the record that Hawk's assets had been, or would be, sold, shows that the bankruptcy was a liquidation rather than a reorganization and was under way by the end of June.

C. Activities at Hawk after the Shutdown

Socquet testified that after he met Cappiello at Hawk's offices on June 13, he left the property. Later Cappiello called him and pointed out that even though Hawk was closed, he had freight in the system that needed to be delivered. He asked Socquet if he could use some of his union employees to deliver that freight. Socquet agreed, but said that Cappiello should call people by seniority and pay contractual rates to deliver this freight.

After this conversation Socquet received a call from Brian Irwin asking if it was all right for him to deliver freight for Hawk. Socquet recalled that Irwin had 8 years, or so, seniority and he told him it was OK.¹⁵ Another driver, Russell Noble, who was on the bottom of the Hawk seniority list, was also rehired as a driver to help deliver the freight in the Hawk system. We don't know from this record why was Cappiello chose this low seniority employee. He was not asked about it, and Noble did not testify. These two employees worked on the clean-out of the freight in the Hawk system until the end of June.

Two other employees testified about conversations with Nicholas Cappiello in the same period, about employment.

John Stockwell had worked as a driver for Hawk since 1986. Stockwell testified that about June 23, Cappiello called him at home and asked him if he would like to come back and work at the new company. Stockwell said no.

Stockwell also testified about another conversation that occurred 6 or 7 months before the shutdown in the Hawk offices on Miry Brook Road. Jack Thorne was there, on the other side of the room, when Cappiello and Stockwell were talking about how much money Cappiello owed the Union and the Internal Revenue Service. Cappiello told Stockwell that he didn't know where the money was going to come from, but, he said, "if anything happens, I'll just shut down, you know, and I'll just open up under another name" Stockwell laughed, because, as he testified, he didn't think Cappiello would actually do what he said he would do. But Stockwell also said that Cappiello mentioned the name of the potential new company, "Hawk Sea & Air."

Cappiello testified that he had called Stockwell but did not offer him a job with "the new company." He said that he offered Stockwell a job with another company called Terminal Transport Services (TTS). Cappiello denied that he had

ever mentioned Air & Sea to Stockwell. He did not deny that he had told Stockwell that he would shut down and open up again under another name.

James Moore had been a driver for Hawk since 1985. He testified that he went into Hawk's office on June 15 to pick up a check, and asked Cappiello about vacation pay. Cappiello mentioned that he "couldn't make it with the Union because it just costs too much to operate." He then asked Moore what he was doing about getting work, and said that if he wanted to work for the new company he would be able to work "for" and "with" Cappiello. Moore asked what it would pay, and Cappiello said about \$15 an hour. Moore then said that he wanted to try other places, and he would get back to Cappiello on the offer. He never did this.¹⁶

Cappiello admitted that he had offered Moore a job.

D. The Organization of Air & Sea

The only thing clear in this record on the organization of Air & Sea is that it was organized.

There were four people who were identified in testimony here as having been involved in the beginning of Air & Sea, Dorothy Axt, Brian Irwin, Mike Schmitt, and his wife Paula Schmitt. Another person may or may not have been either directly involved, or may have participated indirectly through connections with the others. This last person is Nicholas Cappiello.

Dorothy Axt testified that discussions about starting a new company began during the week after the June 10 shutdown and involved herself, Paula Schmitt, who had stayed on after the drivers were terminated, and Brian Irwin, who had been recalled to assist the cleaning out of freight in the Hawk system. The idea started out of a conversation between Axt and Paula Schmitt talking about all the people out of work and what they were going to do. The "big part of it" was her idea, but Axt did admit that Nicholas Cappiello may have been "in and out" of the initial meetings. Both she and Cappiello denied that he had any control over the discussions, but Axt also stated that Cappiello did mention to her about picking up some of his former accounts because he had seen other truckers taking over these accounts. Cappiello himself admitted that he did talk to Axt about things she could do after the business was started. He indirectly admitted that he solicited business for Air & Sea, and said that Irwin's brother (who had at one time been a salesman for Hawk) had got some business for Air & Sea.

Brian Irwin, the other witness who testified here about the beginnings of Air & Sea, said that Axt was not present in the original discussions, but that he was the "driving force" behind a plan to open up a new company by "trying to round up a bunch of people in the know that could come up with a little financing, and a little expertise and somebody to do the billing so that I could do what I do best." It is not clear who Irwin talked to originally, but he soon got together with Axt, Paula Schmitt, and Paula's husband, Mike Schmitt, who, while he had worked for Hawk only as a

¹⁵ Irwin testified that he had worked for Hawk from 1978 to 1984, then quit and come back in 1985. His seniority dated from his return on January 6, 1985. According to a list submitted into evidence by the General Counsel (GCX-4), Irwin had over 9 years of seniority, but in fact he was 10th in order of seniority on that list. There is no indication in the record that any drivers higher on the list than Irwin were asked to make the final deliveries for Hawk.

¹⁶ Moore admitted on cross-examination that he had borrowed some equipment from Hawk in June 1994, and was not charged for it. This does not affect his testimony on the issue raised by that testimony.

dockman and fueling trucks had, according to Irwin, some banking and business experience.

From this testimony, which, as far as it goes, is generally credible, but that obviously omitted many details, it seems that these four people, Brian Irwin, an experienced driver, Paula Schmitt, a rate clerk with some experience as night dispatcher, Mike Schmitt a dockman and light maintenance worker, with some experience in finance and business, and Dorothy Axt, a bookkeeper who had been working part-time for Hawk, as well as part-time for a law firm,¹⁷ had varied experience in the business they were contemplating establishing, but needed a plan, needed time (Irwin testified that the cleaning out of the freight in the Hawk system would take "a couple of weeks"), needed customers, needed equipment, and needed capital, and most of all, needed someone who knew how to run a trucking business in and out of the New York City area.

The time involved was the 2 weeks between June 14, when the organizers of Air & Sea began to talk about setting up a new company, and June 27, the last day that Hawk actually transported freight.

The customers were solicited, as described by Dorothy Axt, by referring callers to the new "company," by Irwin as involving their many contracts with customers and brokers, and by Nicholas Cappiello as solicited by himself and by Brian Irwin's brother, a former salesman for Hawk. All of these resulted in the gathering of some accounts, all, or almost all of which, I find from the evidence here were former customers of Hawk.

The equipment was obtained by leasing several trucks from Hawk at a leased price of \$1 per month. The trucks could not run on Hawk's Interstate Commerce Commission "rights," (permits to carry interstate freight), so Irwin (or someone) arranged to use rights assigned to another trucking company, Terminal Transport services, Inc. (TTS), in consideration of which the new company, Air & Sea, would refer some business to TTS. Irwin and Russell Noble, the two former Hawk drivers who had stayed on to clear out the freight left in the Hawk system after June 10, now hired themselves out to Air & Sea as independent contractors, and thus they began to operate. The trucks initially were garaged at Hawk's property on Miry Brook Rd., and no rent was charged to Air & Sea from June 14 to September 19, 1994.

The capital necessary to finance this infant transportation enterprise was obtained according to Axt's testimony, by the establishment of a partnership between herself, and Mary Ann Cappiello, Nicholas Cappiello's sister, as the two equal partners. There was, at least at the time of this hearing, no written partnership agreement. Counsel for Air & Sea stated on the record that Connecticut law did not require that such agreements be formalized or filed with the State. The capital consisted of \$10,000 contributed by Mary Ann Cappiello, and \$5400 from Dorothy Axt. Each was to be an equal partner, but Axt was to be the person managing the business.

¹⁷No one asked Axt for the name of the law firm. I can draw no inferences from this except that it would have been only natural for Axt to ask the lawyers in the firm for some assistance in the legal issues involved in the establishment of an interstate trucking business. I think it is reasonable and proper to infer, and I do infer and find, that the principals of Hawk Air and Sea did obtain and acted upon legal advice from some source, either the firm Axt worked for, from some other law firm, or from individual lawyers (see GCX-8).

Mary Ann Cappiello later was said by Dorothy Axt to have advanced an additional \$18,200 for the purchase of trucks. There were no promissory notes or other loan documents to verify this.

E. Establishment of Air & Sea as a Business

After Air & Sea was organized it began operations about July 1, 1994. The financial data introduced by the General Counsel are of little help in showing the financial history of Air & Sea in its first months. There is only one document showing receipts (GCX-11, pp 2, 3), but this does not give the dates when payments were received. An accountant's report covering the period July 1 to December 31, 1994 (GCX-14), shows expenses of \$237,281.67 for the period, and revenues of \$259,584.55 for the same period, leaving a net income for the 6-month period of \$22,302.88. These figures do show that Air & Sea was a going concern at the end of the year, but the lack of underlying data, particularly a monthly breakdown of gross income, makes it impossible to draw any conclusions about the Company's month-to-month progress during the last 6 months of 1994.

The numerous pesky details of starting up the business were handled by Axt and Paula Schmitt. Schmitt's home at 14 Harwood Drive in Danbury has served as Air & Sea's offices right down to the time of this hearing, and her home telephone number was used by Air & Sea until new numbers were obtained sometime during the summer. The new telephones were installed at Schmitt's house. She handled the issuance of rights by the ICC, and Axt dealt with Federal and state tax agencies and other details necessary to start a business. Axt also purchased typewriters, a computer, office supplies, three trucks, and a trailer. She presented receipts for all of these purchases.

After Air & Sea had to leave the Miry Brook Road location in September, it moved its terminal operations into a portion of a building located at 101 Commerce Road in Brookfield, Connecticut, a few miles north of Danbury.

This property at 101 Commerce Road is owned by a person named John Angelone, who also owns and operates a mail-order business called "Diversified Fulfillment" in the same location. This business, according to the testimony of Dorothy Axt, sells prints suitable for framing, and tomatoes, or tomato plants. There was no testimony that Diversified sold anything other than this oddly matched pair of items. By coincidence, or perhaps not by coincidence, Nicholas Cappiello was employed by Diversified as a "salesman" during 1994 and 1995. There is no explanation in the record, and Cappiello was not asked, what duties a "salesman" for a mail-order house performs.

According to Axt, Air & Sea paid \$1500 a month rent at 101 Commerce Road, but an accountant's statement covering the period from July 1 to December 31, 1994, including the time from September 19 to December 31 when Air & Sea was located at 101 Commerce Road, shows only \$1,751.82 as rent for the whole period (GCX-14). Air & Sea's 1994 expense sheets (GCX-15) show no payment for rent through November 23, 1994. The November and December expense sheets show \$1500 items identified as "rent," but the listing of checks for December shows no item that could be identified as a rent payment, a payment to Diversified, or to John Angelone. The listing of checks for November does show a

payment of \$1500 for "rent 101 Commerce," paid on November 23.

F. *Air & Sea Personnel and Supervision*

When Hawk was in operation there is no dispute that Cappiello and Jack Thorne handled the dispatching of drivers, and were the day-to-day supervisors of employees. Paula Schmitt was described as a rate clerk and night dispatcher. Hawk had only one shift. Brian Irwin testified that drivers reported in the morning and were dispatched to their routes. He stated that drivers worked long days, sometimes, not returning to the terminal until 8 or 9 at night. Thus the only contact that Paula Schmitt would have with the drivers was if they had run into problems out on the road. There is no evidence that Paula possessed any of the indicia of a supervisor under Hawk.

After Hawk shut down on June 10, 1994, and in the absence of Thorne and Cappiello, Paula took over as manager of the cleanup operation. Cappiello actually hired Irwin and Noble, (and perhaps others, according to Irwin) but he was apparently not around to direct the clearance of freight between June 14 and June 27. Paula continued to act as a manager or supervisor during the first months of the Air & Sea operation. Dorothy Axt, who had been a part-time bookkeeper for 2 months or so before the shutdown, was not equipped or prepared to take over the day-to-day management functions at the Company. In September, Axt gave an affidavit to a Board agent describing Paula as a "manager" of Air & Sea. As time went along, according to Axt, she took over managerial authority from Paula. At the time of this hearing in May 1995, Axt had assumed complete authority to hire and fire, to discipline, and to make all business decisions. Paula remained the dispatcher, but all supervisory decisions had been removed from her. I do not place much credence in Axt as a witness, but in this instance, where Paula herself did not testify, and those who did not mention Paula's supervisory status, I find that the record does not support a finding that Paula Schmitt was a supervisor, except for the period from June 10 to around September 19, 1994, when she served as the day-to-day manager of the cleanup operation at Hawk, and a manager of Air & Sea by Axt's own testimony.

There is no evidence here that Paula Schmitt's husband, Mike, was a supervisor under Hawk, and, while he did assist in the formation of Air & Sea, and acted as an advisor in the purchase of the trucks and trailer in the summer of 1994, he returned to the same basic job he had held for Hawk, loading and unloading freight and performing light maintenance, fueling, and oiling trucks, while Air & Sea was still at the Hawk terminal, and after it moved to 101 Commerce Road

I would add, with respect to Mike, that there is no evidence that he was ever a member of the Union when he worked for Hawk, or that he was considered a part of a bargaining unit that did include a mechanic.¹⁸

In looking at the status of other employees of Air & Sea, in order to determine whether Air & Sea is a single

employer/alter ego of Hawk, or whether Air & Sea is a successor employer to Hawk, we are concerned pretty much exclusively with those employees who were, or are, members of the bargaining unit agreed by the parties here to be an appropriate unit; drivers, one dispatcher and one mechanic. As I have indicated above, Paula Schmitt was a dispatcher, with Hawk, and her husband, Mike Schmitt, was a dock worker and light maintenance man with Hawk. But there is no indication in this record that either of them was carried on the Union's rolls, or considered to be part of the bargaining unit. As there are no other people who were mentioned in the record by any witness in either of those jobs, I will consider only drivers as making up the actual bargaining unit here.

At the time of the shutdown there were 19 names on a seniority-vacation list maintained by Cliff Socquet. Of these, only two were hired for the cleanup of the Hawk system on June 14, Brian Irwin and Russell Noble. There were no payrolls submitted for the month of June.¹⁹ The first payroll for Air & Sea is dated July 7 and shows Russell Noble, Lennox Dennis, and Jerome Stepones. (GCX-9) Dorothy Axt identified Lennox Dennis as a "runner" who works at Kennedy airport in New York and goes around to gather paperwork to save time for drivers coming in and out of the airport. Dennis's name appears throughout the payroll records in evidence here, and he has not been identified as anyone who had anything to do with this case. Stepones was said by Axt to be person who walked in off the street and was given a few hours work in that week only.

In the next payroll period, July 15, Noble appears again, along with Brian Irwin. Two other people, apparently drivers, appear, Dan Kelly and Dennis Keane. According to Axt, Kelly was a man who owned a truck and was called when Air & Sea needed additional help, and Keane was as a short-time employee. Another full-time driver, Matthew Fernandez, was employed in the week of July 22, and he remained at least through the week of September 9 (GCX-9), but he does not appear on a payroll report for the first quarter of 1995 (GCX-10). That document shows three drivers, Noble, Irwin, and Michael J. Cassidy and, other employees, Dorothy Axt, Paula Schmitt, Mike Schmitt, and Nicholas Cappiello III. This last person is Nicholas Cappiello's son. He first appeared on the payroll in the week of September 1, and was thereafter noted on each payroll we have in evidence. According to Dorothy Axt, Nicholas III was in college in 1994 and he had previously been employed by Hawk on a part-time basis as a clerk, while working for Air & Sea. He was used in making calls to solicit business, doing billing, and calling delinquent accounts. Axt stated that he was still employed by Air & Sea as of May 1995.

I do not believe that the employment of young Cappiello is indicative that his father controls this company. It would be a natural thing for Dorothy Axt to hire her boyfriend's son, whoever the boyfriend was, and to keep him on as a employee as long as he was able to perform satisfactorily in the job.

¹⁸ For that matter, there is no evidence that Paula Schmitt, who was carried by Hawk as a night dispatcher was ever a member of the Union, or considered a member of a bargaining unit that also contained a dispatcher.

¹⁹ Some materials, including payrolls and financial statements, had been subpoenaed by the General Counsel. Cappiello maintained that he did not have them, that they were in a trailer on the former Hawk property, that the trailer was locked, and he did not have a key. Thus, there were no records from Hawk available at this hearing.

In any event, what we are interested in here is not the status of office employees, be it dispatchers like Paula Schmitt, or freight handlers like Mike Schmitt, in the absence of evidence that they ever were part of the bargaining unit. We are interested in drivers.²⁰

From the first, Air & Sea employed three drivers, and were still operating with the same number of drivers in May 1995, the time of the hearing. Two of the three drivers for the whole of Air & Sea's existence, were former drivers for Hawk. Under the National Freight Agreement, covering Hawk's employees, all employees must be or become members of a local Union. (GCX 2, art. 3, sec. 1, p. 9)

Under these kinds of provisions there is ordinarily, a presumption of continuing union membership in cases of the sale or transfer of a business to a new employer, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1993). Here there was no sale, but, as has been described, a new business arising from the ashes of the old. In this case, there is no question about the status of Brian Irwin. He was a member of the Union when Hawk shut down, and after that, he sought and obtained provision of the Union to work in the cleanup operation.

There were two new permanent drivers hired by Air & Sea, Matthew Fernandez, from July to sometime late in the fall of 1994, and his successor Michael Cassidy, who was working in the first quarter of 1995. There is no presumption as to their status, and there is no evidence on their membership of nonmembership in the Union. Since they were not working at the same time, they would count as one employee who was not a union member.

Russell Noble's situation is more complicated. Noble was originally hired in 1987, but left Hawk sometime later, worked for Coca-Cola and then returned to Hawk, according to Brian Irwin, 6 or 8 months before Hawk shut down.

Cliff Socquet described the Union's procedure for people who leave union jobs to work elsewhere. They are given withdrawal cards, which allow them to remain members while they are absent, and they are not responsible for paying dues during this time. According to Socquet, Noble took a withdrawal card from Local 677 and went to work for Coca-Cola, described by Socquet as another union job. When he returned to Hawk, sometime late in 1993, he was supposed to notify Local 677 and recommence the payment of dues. If Noble did not notify the Union, then a union steward should have followed up and made him pay his dues. Another way of catching delinquents is through records of health and welfare payments. Socquet did not mention the fact that the union contract (GCX-2, art. 3, sec. 3, p. 16) provides for a checkoff of union dues by employers and transmittal monthly to Union's financial officers. Apparently nothing was done in Noble's case, no steward checked on him; no treasurer noted there was no checkoff from him, and Socquet, when asked, said that Noble did not join the Union. Then, in response to a question from Nicholas Cappiello,

²⁰ The complaint alleges that the unit includes only drivers, but the parties agreed, at the opening of this hearing, with Nicholas Cappiello's statement (not under oath) that one dispatcher and one machanic were included. Such a unit would, in my opinion, be appropriate, but there being no evidence that either Paula Schmitt, a dispatcher, Mike Schmitt, a dock worker, were included in this unit, it does not seem to me that we need be concerned about the dispatcher or mechanic classifications.

"then he did not belong to the Union?" replied, "yes," without explaining whether he meant that Noble did not belong to the Union, or that he did.

I believe that Socquet was saying that, as of the time of the shut down, Noble did not belong to the Union.

This response serves to rebut any presumption that Noble was a member of the Union at the time he commenced working for Air & Sea.

G. Air & Sea Operations

As has been noted, once Hawk had ceased operation, Dorothy Axt, Paula Schmitt, Nicholas Cappiello III, and, presumably, anyone else who answered calls to Hawk's telephone number, advised the callers that Hawk was out of business but that a new company, Air & Sea, was taking over the business. The business, thus begun, operated until mid-September from the former Hawk property on Miry Brook Road. Brian Irwin, Russell Noble, and Matt Fernandez became "owner-operators," not owning, but "renting" Hawk trucks for \$1 a month and using ICC rights borrowed from Terminal Transport Services.

According to Irwin, he contacted a man named "Gene" at TTS and made the arrangements to use TTS rights in exchange for referrals of business. Irwin stated at another point that Paula Schmitt was involved in this transaction. Nicholas Cappiello testified that Jack Thorne, former President of Hawk, made the arrangements with TTS.

The arrangement continued for some time. Cliff Socquet took photographs of trucks with the Hawk "logo" on the doors and superimposed TTS "logos" as late as August 26 and September 1. Subsequently Air & Sea acquired three trucks that did not display either a Hawk "logo," or anything identifying the vehicles as Air & Sea trucks.

As of November 22, Air & Sea received its own authorization from the Interstate Commerce Commission (RX-19) and since then has operated on its own rights. The arrangement with TTS, apparently, ended acrimoniously, but that need not concern us here.

Hawk's business, as we have seen, involved pickups and deliveries to and from its terminal in Danbury to points in Connecticut, and New York State, the three New York metropolitan airports and docks and piers on the New York and New Jersey waterfronts. The waterfront portion of the business, estimated by witnesses here as amounting to from 50 to 70 percent of the gross business of Hawk, involved the handling of loose cargo, but mainly the transfer of trailer-sized containers that were loaded onto or unloaded off specially built trailers, and transported as units.

Air & Sea acquired all, or substantially all, of its business from former customers of Hawk. Despite its name, Air & Sea did not take over any container business and did not send any trucks to the waterfront locations formerly served by Hawk. Other customers of Hawk were lost during the transition period, so that Air & Sea began its operations with three trucks, and had not increased that small fleet as of the time of this hearing. This compares with Hawk's fleet of some 17 trucks. Air & Sea has confined its operations, whether by choice or necessity, to picking up and delivering freight from New York and Connecticut points to the three airports in the New York area.

H. Credibility

The General Counsel urges that I credit his witnesses and that I discredit Respondent's witnesses, including Dorothy Axt, the managing partner of Air & Sea.

Ordinarily, credibility is important in Labor Board cases, sometimes of paramount importance. In situations where there are clearly inconsistent versions of the same events resolutions of credibility are critical. In this case there are few direct contradictions, but there are on the key role of Nicholas Cappiello in the organization and operations of Air & Sea.

All of those witnesses who testified as to Cappiello's role in Air & Sea, Cappiello himself, Dorothy Axt and Brian Irwin, swore that Cappiello was not involved in any way in Air & Sea. Yet in their testimony he was involved in discussions or planning for the new company. Dorothy Axt stated that Cappiello had mentioned to her about taking over former Hawk accounts when he saw other companies picking up those accounts and that he was "in and out" of the early meetings. She mentioned a family tie-in between Cappiello's ex-wife and the sister of the owner at 101 Commerce Road, where Air & Sea rented quarters, and where Nicholas Cappiello was working as a "salesman" of mail order prints and tomato plants. Irwin testified that he had seen Cappiello at the Commerce Road location, but denied that Cappiello was present at any of the initial meetings. He did not say that Cappiello was not present at any meetings because, in his words, Cappiello was gone before Irwin arrived back at the terminal in the evening. Cappiello said, while on the witness stand, that he was constantly asking Axt how things were going, and that he was "glad to help her out if she asked any questions about the business."

From this it is clear that Cappiello had not closed the door and walked away from the business as of June 10. The people involved had little or no experience in running a business.²¹ Dorothy Axt had been a bookkeeper in a law firm, and for 2 months with Hawk. Paula Schmitt had experience as a dispatcher and rate clerk. Mary Ann Cappiello had no relevant experience, and Brian Irwin wished only to furnish the "brawn," the vigor and stamina to work long, hard, hours to help the enterprise.²²

I believe that I could infer and find that Cappiello was involved in the formation of Air & Sea based on the testimony of Axt, Irwin, and Cappiello himself. But there is more evidence dealing with Cappiello's motives here, and his demonstrated authority on behalf of Air & Sea.

John Stockwell, a driver for Hawk since 1986, testified that 5 or 7 months before the shutdown, Nicholas Cappiello had a conversation with him in which Cappiello was complaining about how much money he owed the Union and the IRS and about the fact that he didn't know where the money was going to come from. Cappiello stated after that according to Stockwell, that if "anything happens I'll just shut

down, you know, and I'll just open up under another name." Stockwell thought he was joking, even when Cappiello added that the name of the new company would be "Hawk Sea and Air."

After the shutdown, on June 23, when the cleanup was still going on, and before Air & Sea had actually started up, Stockwell testified that he got a call at home from Cappiello, who asked him if he would like to come back to work at the new company. Stockwell said no.

James Moore, a driver for Hawk since 1985, testified that he went in to the Hawk offices on June 15 to pick up his final check. He chatted with Cappiello about vacation pay. Cappiello mentioned that he couldn't make it with the Union because it just costs too much to operate. Moore said he was putting in applications. Cappiello then said that if he wanted to work for the new company Moore would be able to work "with him, for him." Moore asked what it would pay, and he said about \$15 an hour. Moore said he wanted to try some of the other places he had applications in, and other places he had been told about. He said he would get back to Cappiello, but he never did get back to him.

Cappiello admitted that he had offered James Moore a job, but denied that he had ever told Stockwell about a new company, or about Air & Sea. He did admit that he had mentioned a job to Stockwell, but he said the job was one at TTS he had heard about from some unknown informant.

I found both Moore and Stockwell to be candid and forthright witnesses. They had nothing to gain or lose from their testimony here, and, in Moore's case, his testimony was uncontroverted, and in Stockwell's, only partially denied, although the job offer was mentioned, but with another company. I do not credit Cappiello's denials, and I find that these job offers to Air & Sea were made as Moore and Stockwell testified. I further credit Stockwell's testimony about Cappiello's plan for the future of Hawk, and his conception of a new company to rise after Hawk's shutdown.

Cappiello's credibility also suffers from what I find to be a lack of candor in his statements made during a discussion concerning documents subpoenaed by the General Counsel at the opening of the hearing. The General Counsel asked about certain records of Hawk's business and Cappiello answered that they were in a trailer located in Hawk's old property, for which Cappiello did not have a key. I appreciate the fact that Cappiello was not under oath when he made this statement, and he did not testify on this point, but he was present, as counsel for Hawk, while this issue was discussed, and he made no comment, and no denial that this was the case.

My problem with this is not only that we were handicapped at this hearing by the fact that we had no documents available, even though the documents had been subpoenaed, showing Hawk's revenues and expenditures, and lists of customers, but I find it very difficult to imagine anyone who is in trouble with the Internal Revenue Service, not to mention the National Labor Relations Board, who would leave records of income, expenditures, customers, creditors, and other financial matters, in a trailer on someone else's property, without having a key, leaving him with no access to the documents, or with any way to assure their security. I find that unbelievable, and I discredit Cappiello's testimony on this and other critical issues.

In addition to the credibility question, the documents in the locked trailer were unavailable to show Hawk's revenues

²¹ Irwin had owned a trucking business for a short period, but he forswore any knowledge of, or desire, to run a trucking business in this situation.

²² Mike Schmitt was said to have had same banking and financial experience, but his actual work for Hawk and for Air & Sea did not bespeak any high or mid-level business background. Jack Thorne, the former President of Hawk, does not figure in the Air & Sea picture at all.

and expenditures, matters that would be of importance to the Trustee in Bankruptcy, as well as in this forum, an absence of important records, due, I find, solely to the action or inaction of Nicholas Cappiello. I have thus had to attempt to reconstruct some of the economic data that was not available, using figures in this record showing revenues and expenditures of Air & Sea from July to December 1994 to estimate Hawk's figures for its last year. In GCX-14, Air & Sea's accountants showed revenue of \$259,584.55 for the July 1 through December 21, 1994 period. This would amount to revenue for each of Air & Sea's three trucks of \$14,421.63 per month. Hawk was running 17 trucks, so, at \$14,421.63 per truck per month, Hawk would have received \$245,167.71 a month, or \$2,942,012.50 for a 12-month period. The ratio of expenses to revenue was high for Air & Sea, expenses showing as 91 percent of revenues. Using this percentage, Hawk's net income for the 1-year period would be \$259,584.55. The 9-percent return should have allowed for expenses such as Internal Revenue payments and payments to Union's pension and health and welfare funds, unless, of course, moneys were diverted to other purposes that might have been revealed by the unavailable records. But that is speculation, and I cannot say for sure that any moneys were in fact diverted.

Suffice it to say that these figures might well have shown a financial picture different from that claimed by Cappiello, and his failure to produce necessary records can only cast further doubt on the financial basis for the establishment of Air & Sea, and the origins of the capital necessary for its survival.

Dorothy Axt was an intelligent and careful witness. Her testimony about her actions in the formation of Air & Sea, and her cataloging of the expenses Air & Sea incurred in outfitting itself to become a trucking company, were all credible and logical actions of anyone starting a new business. Indeed, these actions were so logical that I believe she must have been advised by someone with a certain familiarity with the National Labor Relations Act. This could have been someone from the law firm, not identified, where she had worked part-time up to October 1994, or some other law firm. I mean no criticism by this. Anyone starting a new business should have competent legal advice. The only thing is that here, unlike other brand-new businesses, we have the fact that the new business is taking over a number of accounts of an old business, which had a contract and certain obligations to a union, and that the owner of the old business is the current boy friend of the new business's founder. This leads me to mistrust Axt's testimony not so much for what she said, although she was contradicted by Cappiello himself in his statement about their business discussions, but in what she did not say. Because of the contradictions in her testimony and that of Cappiello on his business communications with her. I do not credit Axt in her denial that Cappiello was involved in the creation and operation of Air & Sea.

I. The Single Employer Issue

The Third Circuit has encapsulated the single employer doctrine in stating:

An "single employer" relationship exists when two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is

in fact only a "single employer." The question in the "single employer" situation is whether the two nominally independent enterprise, in reality, constitute only one integrated enterprise. *NLRB v Browning-Ferris Industries of Pennsylvania, Inc.*, (CA 3, 1982) 691 F.2d 1117, 1122.

The criteria customarily used by the Board in determining whether a "single employer" issue is present are interrelation of operations, common management, centralized control of labor relations and common ownership, *Electrical Workers IBEW Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965).

Here, while there are elements of common management and control of labor relations, the facts are that Hawk was out of business before Air & Sea was organized, and it is my feeling that the alter ego frame work is better suited for the existing situation, and that Hawk and Air & Sea were never a single employer for purposes of the Act.

J. The Alter Ego Issue

The general principles for the single employer issue are similar, but the alter ego issue has factors that more closely approach the factual situation in this case.

The alter ego issue, like the single employer question, turns on the facts of the specific case *Overton Markets, Inc.*, 142 NLRB 615 (1963). Factors to be considered in an alter ego situation are (1) interrelation of operations; (2) common management; (3) common ownership; and (4) common control of labor relations. The Board has generally found alter ego status where the two enterprises involved are found to have substantially identical management, business purposes, operations, equipment, customers, and supervision, as well as ownership. *Crawford Door Sales, Inc.*, 226 NLRB 1144 (1975); *Denzil S. Alkire*, 259 NLRB 1323 (1983); *Advance Electric, Inc.*, 268 NLRB 1001 (1984).

A further, and critical, consideration to the finding of alter ego status is whether the new company was created "to evade responsibilities under the Act." *Fugazy Continental Corp.*, 265 NLRB 1301 (1982); *NLRB v. Al Bryant, Inc.*, 260 NLRB 128 (1982), *enfd.* 711 F.2d 543 (3d Cir. 1983), *cert. denied* 464 U.S. 1039 (1984).

In this case there is, in my opinion, a real question about common ownership. Nicholas Cappiello was the sole owner of Hawk. The only evidence we have here about the ownership of Air & Sea is Dorothy Axt's testimony stating that Air & Sea is a partnership, in which she put \$5400 of her own money, and Mary Ann Cappiello put in \$10,000 of her own money. This would make a total of \$14,500 in partnership assets.

I have three comments on this. First, there was no partnership agreement. There is no explanation in the record for this and it seems a rather unbusinesslike way to start a business. Second, Mary Ann Cappiello did not testify in this proceeding. I generally do not draw inferences from the failure of a witness to testify, but here, where no reason was given for Mary Ann's failure to testify, I think a legitimate question may be asked as to whether in fact it was Mary Ann's money that was contributed to the partnership. Third, I note that Air & Sea began operations on July 1, 1994, ostensibly with capitalization of \$15,400. Figures supplied by Air & Sea (GCX-9) show that for owner-operator expenses alone,

up to August 4, the sum of \$14,466.50 had been expended. By August 12, the total is \$18,671.50, and by September 1, \$26,131.50. There are no figures showing revenues for that period, and, in my experience, it is unlikely that a new business would begin to receive any payments on accounts, provided it had any accounts, for at least 30 days from the date of invoices, beginning around August 1.

These figures raise questions on the purported sources of money invested by the partners, and the ability of the partnership to continue in business, given the expenses shown on GCX-9. In the absence of any explanation of how this company could function, undercapitalized as it was, with an increasing payroll and other unreported, expenses, I am led to the conclusion that the only reason Air & Sea did survive was that it had other sources of capital. With no other logical or practical explanation by the Respondents, I find that the only logical source of capital was not the inadequate sums allegedly invested by Axt and Mary Ann Cappiello, but rather, was from Nicholas Cappiello. I find Cappiello to be, a "partner" or "owner" of Air & Sea based on his failure to produce any records of his own, or Hawk's, financial status, his connections with the organization of Air & Sea, his statements to John Stockwell, as well as the logical failure of any other explanation for the survival of Air and Sea. *Shattuck-Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Cappiello's position in the management of Air & Sea, hinted at in his testimony about his "advice" to Axt on her management of the enterprise, is verified by the testimony of Stockwell and Moore that he offered them jobs with the new company. Neither witness testified that Cappiello said that he had to refer his offer to any other person, and, in his own testimony, Cappiello admitted offering a job to Moore. Moore's testimony further quotes Cappiello as saying that if Moore came to work for the new company he would be working for "him," Cappiello, not for Axt, or any partnership owner of Air & Sea.

This testimony, which I have credited, places Cappiello in a management position having some control over labor relations matters such as hiring in the new company, which was still in its formative stage in June, when these offers were made.

As may be seen from the introductory sections of this decision, Hawk operated from its property on Miry Brook Road in Danbury to and from the New York area airports and piers. The only estimates we have, from Cappiello, Irwin and Axt, of the amounts of business attributable to each of these areas, indicates that about 70 percent of Hawk's business was in the transportation of containers between the docks and locations in New York and Connecticut. Cappiello testified that Hawk ran 3 trucks to the airports everyday, 3 to local deliveries, and 11 or 12 to the docks for container business. I note also that Cappiello had complained to Socquet that he was suffering from nonunion competition in his container business.

Air & Sea began and continued servicing accounts at the airports and in local deliveries. At no time up to the date of this hearing was there any evidence that Air & Sea was involved in the container end of the business. However, there is no question that the nature of the business, pickup and delivery of freight, remained the same. I find that Air & Sea continued in the same business as Hawk.

While Hawk went out of business in June of 1994, it did continue to function in a cleanup operation, according to Brian Irwin's testimony, until the end of June. Irwin and Russell Noble operated Hawk vehicles in purging the Hawk system of freight in transit.

When Air & Sea started its operation, sometime around July 1, although it may have been earlier, Irwin, Noble, and shortly thereafter, Matt Fernandez, began Air & Sea pickups and deliveries using the same Hawk trucks, rented at hardly an arm's-length figures of \$1.00 a month. The Air & Sea operation also used the telephones and equipment belonging to Hawk, in Hawk's offices. As shown by receipts submitted in evidence, Air & Sea began to buy office equipment and supplies in July, but most of the receipts submitted were dated in September or later in 1991, after Air & Sea had to move out of rent-free quarters at Hawk's former location on September 18.

Air & Sea brought several trucks, one in August, one in September and a third in October 1994, and two trailers early in 1995. It is not known whether, or for how long, Air & Sea continued to use Hawk trucks, tractors, or trailers, but the practice probably continued at least until the two trailers were brought early in 1995.

Air & Sea's customers were listed in an exhibit showing accounts receivable as of February 28, 1995, identified by Dorothy Axt and entered into evidence by the General Counsel (GCX-11). This document, like most of the few financial records of Air & Sea entered in evidence here, was rather crudely prepared, but this one does list a number of companies that did business with Air & Sea, apparently in February 1995. The names listed thereon were shown to James Moore, who identified most of the names as former customers of Hawk. In the absence of any contrary evidence, or of any more definitive documentation, I find that Moore's memory was accurate and that most of Air & Sea's customers were, in fact, former customers of Hawk.

Finally, comes the issue of motive. Was one of the reasons for the closing of Hawk and the creation of Air & Sea "to evade responsibilities under the Act?" *Fugazy Continental Corp.*, supra. I don't think there is any doubt about this. The facts I have found here show that Cappiello had serious problems with overdue payments to the Union's pension and health and welfare funds.²³ He had complained to Socquet about these delinquencies, and also to James Moore, and John Stockwell, telling Stockwell that he didn't know how he was going to get the money to continue operating, and Moore that he "couldn't make it with the Union because it just costs too much to operate." In the conversation with Stockwell, 6 or 7 months before the shutdown, Cappiello admitted that "if anything happens" he would "just shut down, you know, and I'll just open up under another name." Cappiello even gave Stockwell the name of the new company, "Hawk Sea and Air."

On the basis of this evidence, the inference of ownership in Air & Sea by Nicholas Cappiello based on the practical impossibility of survival by Air & Sea with the capital described in Dorothy Axt's testimony; Cappiello's obvious position in the management of Air & Sea based on his unqualified unconditional offers of jobs to Stockwell and Moore; the

²³ Along with what Cappiello described as \$180,000 due the IRS for income taxes, medicare, and social security deductions.

use of the trucks trailers, and equipment, office and terminal space at no fees or token amounts for leases during the July-September period; the conduct of the same kind of business although reduced in size; using the use of some of the same employees; and, for a while, the same equipment; serving the same customers in the same way; all in furtherance of a plan to fold up the old employer and reopen as a new business expressly in order to avoid existing liabilities and obligations; I find that Air & Sea is a disguised continuation of Hawk, and an alter ego of Hawk. See *Crawford Door Sales*, supra; *Advance Electric, Inc.*, supra.

K. The Successorship Issue

This issue is determined in this case by the fact that, of the three individuals hired as drivers by Air & Sea, which began and remained the "substantial and representative complement of unit employees (See sec. III,F, supra), only one, Irwin, was, and so far as the record reveals, still is, a member of the Union. The two successive employees, Fernandez and Cassidy were not union members, and the third permanent employee, Russell, Noble, was described by Cliff Socquet, as not being a member of the Union.²⁴

Thus, it appears to me that the Union never represented a majority of the employees of Air & Sea, *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), *Citisteel USA*, 312 NLRB 815 (1993).

L. Bypassing of the Union

The complaint alleges that on or about June 15 and 23, 1994, in separate incidents, the Respondent Hawk, by its owner, Nicholas Cappiello, bypassed the Union and dealt directly with two of its employees. As I have found that Cappiello did approach James Moore on June 15, and John Stockwell on June 23, offering them jobs with a new, non-union, employer, in Moore's case at wages different than those paid by Hawk under its union contract, I find that these allegations in the complaint have been established, and that Respondent Hawk has, by such actions, violated Section 8(a)(1) and (5) of the Act.

M. The Refusal to Bargain

Since I have found that Hawk and Air & Sea are alter egos, and that Air & Sea is a disguised continuation of Hawk, I find that by failing to continue in full force the collective-bargaining agreements between Hawk and the Union, after June 10, and by Air & Sea's failure and refusal to bargain with the Union after that date, the Respondent has further violated Section 8(a)(1) and (5) of the Act. See, generally, *Kenmore Contracting Co.*, 289 NLRB 336 (1988).²⁵

THE REMEDY

Having found that the Respondent has violated the Act by refusing to bargain with the Union, and by dealing individually with its employees, I shall recommend that it cease and

desist therefrom, and that it take certain affirmative action designed to effectuated the policies of the Act.

Since Hawk and Air & Sea have refused to bargain with the Union since June 10, 1994, I shall recommend that, on request, they will immediately bargain in good faith with the Union under the provisions of collective-bargaining agreements in force and effort since June 1994.

Since the Respondents have not make wage payments and other benefits to employees, or contributed to contractually mandated pension and health welfare funds since June 10, 1994, I shall recommend that it make its employees whole for wages lost because of its refusal to pay contractual rates, together with interest thereon commputed in accord with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, I shall recommend that Respondent pay to the appropriate pension and health and welfare funds any arrears in payments due on and since June 10, 1994.

CONCLUSION OF LAW

1. The Respondent Hawk of Connecticut, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Hawk Air & Sea is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondents Hawk of Connecticut, Inc. and Hawk Air & Sea, is a continuation of Hawk of Connecticut, Inc., within the meaning of the Act.

4. The following employees of Respondents constitute a unit appropriate for collective bargain within the meaning of Section 9(b) of the Act:

All drivers, a mechanic and a dispatcher employed by Hawk and Air & Sea, but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

5. The Respondents have violated Section 8(a)(1) and (5) of the Act by unilaterally dealing with, and offering employment to their employees on June 15 and 23, 1994.

6. The Respondents have violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively and in good faith with the Union since June 10, 1994.

7. The Respondents have violated Section 8(a)(1) and (5) of the Act by failing to pay employees at contractual wage rates, and with awarding contractual benefits since June 10, 1994.

8. The Respondents have violated Section 8(a)(1) and (5) of the Act by failing and refusing to make payments to contractually mandated pension and health and welfare funds before and since June 10, 1994.

9. The above unfair labor practices are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁶

²⁴ The testimony of Dorothy Axt that Noble had shown her a withdrawal card from the Union is not, in my opinion, significant to this issue.

²⁵ Cf. *First Class Maintenance Services, Inc.*, 289 NLRB 484 (1988). I do not believe that case is on point here, since it was family membership that was at issue there, and it is the actions of Nicholas Cappiello that control the decision in this case.

²⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, Hawk of Connecticut, Inc., Nicholas T. Cappiello Jr., and Dorothy Axt and Mary Ann Cappiello, partners, d/b/a Hawk Air & Sea, Danbury, Connecticut, their officers, agents, successors, and assigns, heirs, devisees, or personal representatives, shall

1. Cease and desist from

(a) Dealing individually with employees represented by the Union.

(b) Refusing to bargain in good faith with the Union concerning rates of pay, wages, hours and working conditions of employees in the following appropriate unit:

All drivers, a mechanic and a dispatcher employed by Hawk and Air & Sea, but excluding all office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

(c) Failing and refusing to make payments to appropriate pension funds and health and welfare funds in account of their employees.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith concerning wages, hours and working conditions of employment with the Union.

(b) Make their employees whole for wages and other benefits lost by them because of Respondents' refusal to apply

mandatory contract terms, in the manner set forth in the remedy section of this decision.

(c) Pay to the appropriate Pension and Health and Welfare funds payments contractually mandated in account of Respondents' employees from and after June 10, 1994.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its 101 Commerce Road, Brookfield, Connecticut facility copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."